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No. 86-1441

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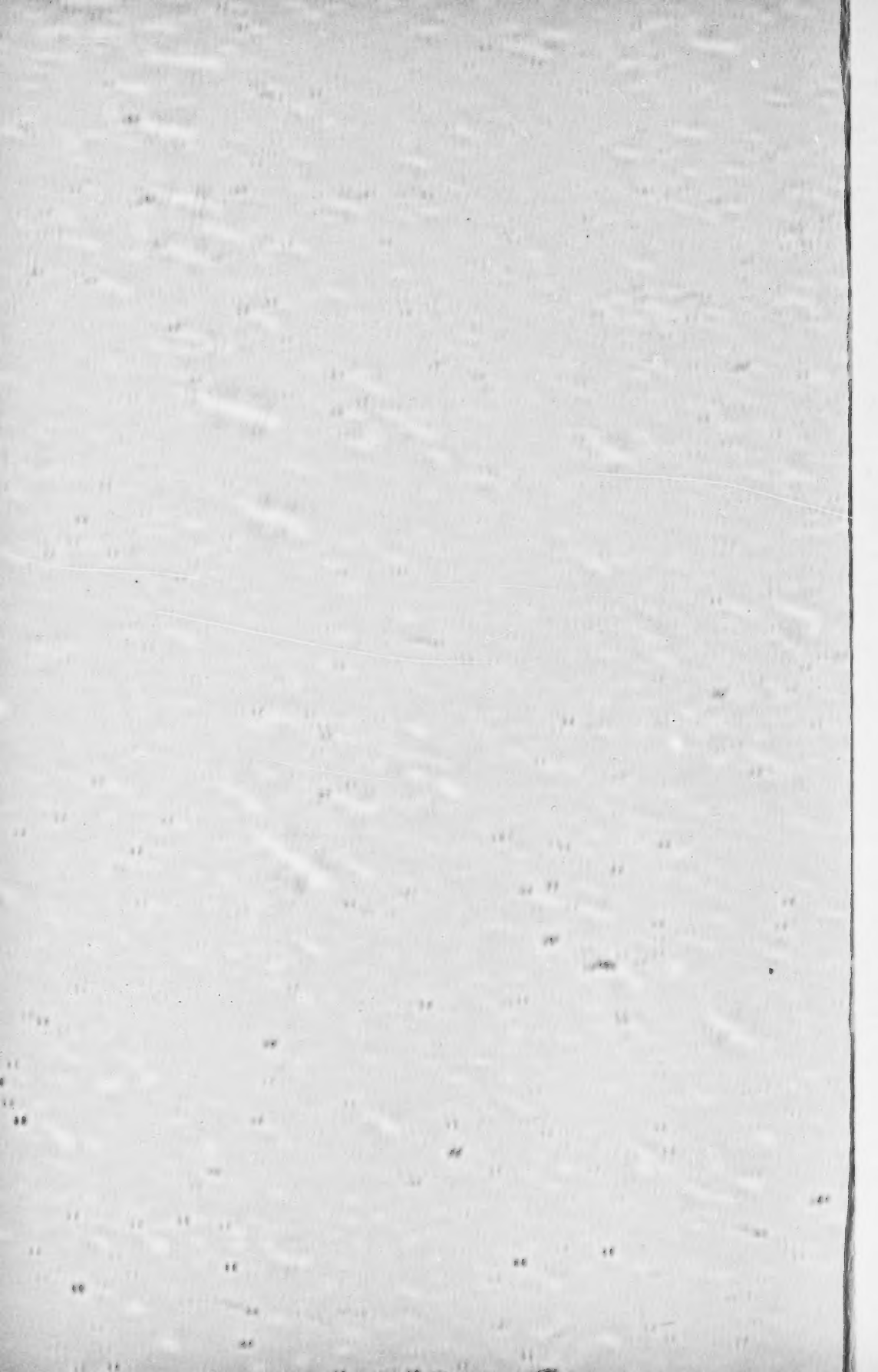
October Term 1986

LEONARD SOLTIES and CECILIA SOLTIES, h/w
Petitioners,
v.
MASSEY-FERGUSON, INC.,
Respondent.

BRIEF FOR RESPONDENT MASSEY-FERGUSON,
INC. IN OPPOSITION TO PETITION FOR
CERTIORARI TO THE SUPREME COURT
OF THE UNITED STATES

On Appeal From the Final Order Denying Reargument
Entered by the United States Court of Appeals
for the Third Circuit at No. 86-3092
Entered November 19, 1986.

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QUESTIONS PRESENTED FOR REVIEW

- I. THE TRIAL COURT'S DENIAL OF PLAINTIFFS' REQUEST FOR A CONTINUANCE DOES NOT PROVIDE A BASIS FOR A CONSTITUTIONAL CHALLENGE OF A VIOLATION OF DUE PROCESS.**
- II. THE TRIAL COURT'S CHARGE WAS CONSISTENT WITH PENNSYLVANIA LAW AND AS SUCH DOES NOT CONSTITUTE A BASIS FOR REVIEW BY THIS COURT.**
- III. THE TRIAL COURT'S EXCLUSION OF PLAINTIFFS' REBUTTAL TESTIMONY WAS PROPER AND DOES NOT PROVIDE A BASIS FOR A CONSTITUTIONAL CHALLENGE OF A VIOLATION OF DUE PROCESS.**

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs below: Leonard and Cecilia Solties, husband and wife.

Defendants below: Massey-Ferguson, Inc., and International Harvester Company.

International Harvester Company was dismissed as a party defendant before trial and did not participate in the trial or appellate proceedings below.

Massey-Ferguson, Ltd. is the parent corporation of Massey-Ferguson, Inc. The shares of Massey-Ferguson, Inc. are held by Massey-Ferguson (Delaware), Inc., which shares are owned by Massey-Ferguson, Ltd., a Canadian corporation. This information was included on the disclosure of corporate affiliations and financial interest statement filed with the United States Court of Appeals for the Third Circuit at No. 86-3092 on February 11, 1986.

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COUNTERSTATEMENT OF THE CASE

The instant action was filed as a result of an accident which occurred on November 2, 1982, at which time Leonard Solties sustained injuries to his right hand and leg while attempting to unplug a corn picker by reaching into an area where snapping rolls and gathering chains were rotating. Mr. Solties did this in spite of being fully aware of all of the hazards and dangers involved in attempting to unplug a corn picker while it was still operating. (R. 189a-190a).

The instant action was commenced as a diversity jurisdiction/products liability action against Massey-Ferguson, contending that there were two defects in the equipment that caused the injuries sustained by Mr. Solties. The first contention was that there should have been "stripper plates" over the snapping rolls to act as a guard and the second item was that there should have been an emergency cutoff device in the form of a wire placed on the shield to the right of the snapping rolls which could shut off the equipment in case the plaintiff became caught in the rollers. (T.R. 218).

After a three-day trial on liability only before Judge Willson and a jury, a verdict was returned in favor of Massey-Ferguson. Thereafter, Petitioners appealed this matter to the Court of Appeals for the Third Circuit, which affirmed the trial court. A Petition for Reargument was subsequently denied. Plaintiff filed the instant Petition for Certiorari, alleging that there exists a sufficient basis for this Honorable Court to grant Certiorari.

The corn picker involved in the accident was manufactured by the Respondent under its prior corporate name of Massey-Harris in 1950 or 1951, slightly more than 30 years before the accident. It is a single row pull type corn picker that is connected to a tractor at the power takeoff unit. Through the use of gears and chains, the various components of the corn picker operate. (R. 132a-133a).

The plaintiff's injuries occurred at the head of the corn picker, which contains two separate moving parts. The first part is the gathering chains which are used to gather the corn stalks and move them into the head and up the snapping rolls. The second part is the snapping rolls which rotate toward each other and are designed to grip and pull the corn stalks in a downward motion and to snap the ears of corn from the stalks in such a manner that between 75 to 90 percent of the husks are also removed. These moving parts are contained within a V-shaped structure of smooth metal so that the corn stalks will slide easily over them and through the snapping rolls. (T.R. 311-312, 314-316).

The ears of the corn then pass through an opening in the sheet metal of the head onto an elevator that carries them to the husking bed. The small husking bed removes the balance of the husks from the picked corn. (T.R. 311). From the bed, the corn is then carried by means of an elevator to a position from which it is dropped into a wagon or similar container that is pulled behind the corn picker. (R. 134a).

It is necessary to coordinate the speed of the tractor over the ground with the speed of the gathering chains and the snapping rolls. Ideally, the corn stalks will remain in a vertical position as they move through the head of the picker. The head has pointed metal snouts which help to pickup bent over stalks of corn. The gathering chains then help move these stalks into snapping rolls. (T.R. 314-316). For the gathering chains to function, they have metal fingers attached which grab on to the stalks of corn.

The snapping rolls have sharp ridges of metal so that they can grip stalks to impart the necessary downward motion so that the corn picker can move through the stalk at the appropriate rate of speed. Due to different varieties of corn, the snapping rolls are adjustable as far as their separation is concerned. (T.R. 229). In addition, the set screws can be utilized to impart a more aggressive

grip to the corn stalk to facilitate its movement through the snapping rolls. (R. 160a).

The type of corn involved in the instant case is field corn, utilized to feed farm animals. Since the corn is to be stored, it is essential that all of the husks be removed since husks will spoil the corn. (R. 156a, 263a).

On the morning of the accident, the plaintiff found that the worn snapping rolls of the corn picker would not pull the damp corn stalks through in an appropriate manner thereby causing the corn picker to plug. Despite knowing that he was to shut off the PTO before attempting to unplug the picker, (R. 189a-190a), Mr. Solties did not do so and when he attempted to unjam the head of the corn picker with the snapping rolls still rotating, the stalks began to move through and his right hand was pulled into the very rear portion of the corn picker head. Mr. Solties' hand was still in the form of a fist when it came in contact with the rolls as the injury he sustained was to the knuckle portion of his right hand. (R. 178a). As a result of the downward pull of the corn stalk through the rolls, or in an effort to get his balance and brace himself, Mr. Solties' right leg entered the front portion of the head so that the lower leg was caught by the gathering chains.

Leonard Solties did not testify that the accident occurred as set forth above, but rather, testified that while walking around the operating machine in an effort to locate a noise, he slipped, causing his right hand to first come into contact with the inside surface of the snout and then slide down into the snapping rolls. However, this version of the accident was contradicted at the trial by either direct testimony, circumstantial evidence or physical facts.

The contradictions began with the acquisition of the corn picker and carried on all through Mr. Solties' story including what he did immediately after the injury occurred. His testimony as to how he obtained the equipment was contradicted by the prior owner of the

equipment, Homer Barber. (R. 260a). His testimony as to what he accomplished on the morning of the accident was contradicted by Neal Chelton and Petitioner's brother, Anthony Solties. (R. 264a-265a, 298a). Mr. Solties' testimony as to the condition of the snapping rolls was contradicted by the testimony of Neal Chelton and his brother, Anthony Solties. (R. 266a, 298a-299a). Mr. Solties' version as to how the accident occurred was contradicted by the testimony of his brother Anthony Solties, and by the physical facts of the construction and location of the items within the equipment and the injuries themselves. As an example, Anthony Solties testified that his brother told him he was injured while trying to unjam the equipment. (R. 299a).

The Petitioner's description of how he fell into the equipment would have necessitated severe injuries to his upper right extremity caused by the gathering chains which pass over the snapping rolls. However, the physical facts reveal that the injury was limited to the knuckle portion of his hand. Therefore, the only place that he could have contacted the snapping rolls was toward the rear of the head where there were no gathering chains. (R. 285a). Since his hand entered the equipment in the form of a fist, based upon his injury, it is far more likely that he encountered the rolls as a result of having been grasping a corn stalk rather than having fallen.

Petitioners attempted to support their liability claim by alleging that there were two defects in the equipment that caused the injuries sustained by the plaintiff, the lack of "stripper plates" over the snapping rolls and the lack of an emergency shutoff device which could be used to shutoff the equipment in the case of someone becoming caught in the rollers. However, the expert testimony introduced by the plaintiff was overshadowed by the extremely credible testimony of Respondent's expert, John Zich. Mr. Zich has an engineering degree in agriculture and 48 years of direct experience in the farm machine

industry. (T.R. 287). He was directly involved in the design and construction of one of the corn pickers built with stripper plates that plaintiff's expert referred to in his testimony. (T.R. 305). Contrary to plaintiff's expert, Mr. Zich testified that the stripper plates were thoroughly investigated, tested and utilized by various manufacturers. As a result of this experience, it was clear that the pickers using stripper plates would not husk the corn which, while desirable for sweet corn or popcorn, was detrimental to field corn which was what Mr. Solties was farming. (T.R. 309-312).

As was stated by the Petitioner himself and Neal Chelton, husks on field corn cause it to spoil. (R. 156a, 263a). In addition, stripper plates will not prevent injuries since they are underneath the gathering chains and are wider apart than the snapping rolls. (R. 283a-284a). Therefore, since they are not designed to be guards, they would not protect a farmer from injury if he chose to ignore the warnings and attempted to unjam an operating corn picker.

Petitioners also attempted to prove that the equipment should have had an emergency stop mechanism. This of course would not have prevented plaintiff's injury and based upon the mechanism of Mr. Solties' injury, it would not have even reduced the severity. The design recommended by Petitioners' expert would have interfered with the effective operation of the picker and increased the incidence of plugging thereby increasing the possibility of injury by farmers having to unplug the equipment. (T.R. 320-321), (R. 276a). In addition, the mechanism advocated by Petitioners' expert would have been physically impossible for Mr. Solties to utilize because of its location and the amount of strength required to activate it. (T.R. 320-322).

The evidence was clearly supportive of Mr. Zich's opinion that the product in question was not defective and therefore not a cause of plaintiff's injuries. (R. 277a). The matter was submitted to the jury in such a

manner that if the jury found that a product was defective, they would return a verdict for the plaintiff. The jury was not charged that they could find the defendant was not liable because the plaintiff assumed a risk. The jury's verdict for Massey-Ferguson was a clear statement that they did not find the product to be defective.

I. THE TRIAL COURT'S DENIAL OF PLAINTIFFS' REQUEST FOR A CONTINUANCE DOES NOT PROVIDE A BASIS FOR A CONSTITUTIONAL CHALLENGE OF A VIOLATION OF DUE PROCESS

It is well-established that the granting or refusal of a continuance is a matter within the sound discretion of the trial court, and shall not be reversed unless there is an abuse of discretion. See generally *Grothusen v. National Railroad Passenger Corp.*, 603 F. Supp. 486 (3rd Cir., 1984); *Harvey v. Andrist*, 754 F.2d 569 (5th Cir., 1985). When presented with a constitutional challenge, "[T]he determination of whether a denial of a continuance is arbitrary enough to violate due process depends on the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *United States v. Bernhardt*, 642 F.2d 251, 252 (8th Cir., 1981), citing *Ungar v. Sarafite*, 376 U.S. 575 (1984). A review of the circumstances present in the instant case, and the reasons presented for the continuance, clearly indicate that the trial court did not abuse its discretion by refusing Petitioners' request and likewise, did not deprive Petitioners of due process.

The record reveals that prior to the subject request for a continuance, the trial court had continued the case on two occasions. The first continuance occurred because the case was not ready for trial. The second continuance was due to the unavailability of counsel. At an argument held on November 4, 1985, the Court made it clear that the case would be tried commencing January

13, 1986, and that a final pre-trial would take place on January 7, 1986. (T.R. 35).

In addition to the fact that the case had already been previously continued, the trial judge was not certain as to his future status as a senior judge. Judge Willson was the sole judge to handle this matter from the time of its initial transfer to the Western District and as such, did not want to leave this matter to be tried by a judge totally unfamiliar with the facts and the parties. (R. 115a-116a).

While the trial judge had valid reasons for desiring to dispose of the trial of this case when scheduled, Petitioners failed to provide the Court with substantial justification for continuing this matter. The cases relied on by the Petitioners as support for their position that the trial judge abused his discretion, are not controlling on the instant case. In *Smith-Weik Machinery Corp. v. Murdock Machine & Engineering Co.*, 423 F.2d 842 (5th Cir., 1970), the trial court had significantly advanced the trial date and refused a request for a continuance of four days. Nor is *Latham v. Crofters, Inc.*, 492 F.2d 913 (4th Cir., 1974), controlling on the instant situation, where the attorney was also the defendant and was ill and unable to attend the trial. Likewise, in *Cornwell v. Cornwell*, 118 F.2d 396 (D.C. Cir., 1941), and *Gaspar v. Kassam*, 493 F.2d 964 (3rd. Cir. 1974), the requests for continuances were because of the illness of a party to the respective actions.

In the case at bar, Petitioners' request was vague and indefinite both as to the *reason* for the request and the *duration* of the continuance. The only explanation ever given for the continuance was set forth by Mr. Johnson, one of Petitioners' counsel when he said "They've explained to me it's a serious problem with the wife and for the next 30 to 45 days that may tell the answer on it, and he's very upset." (R. 107a). Based on this vague statement, Judge Willson denied the request and stated: "...[W]e can't postpone a case on that statement." (R.

107a). In spite of Petitioners being advised that their reason for a continuance was insufficient, the record is void of any additional justification for the continuance. There was never any explanation given as to what the "serious problem" involved, nor was there any explanation as to why Mr. Rosenbleeth could not appear to try the case for the relatively short period of time it would have required.

The Petitioners argue that Mr. Rosenbleeth was their lead counsel and that they were forced to find substitute counsel for him at the last minute. The record does not support these contentions. To begin, Mr. Rosenbleeth did not take an active part in the preparation of the case. Out of nine depositions that were taken, he attended three. In addition, out of all the pre-trial conferences that were held, he attended only one. On the other hand, Mr. Haft, who also represented the Petitioners, attended all of the depositions and all of the pre-trial conferences. It is little wonder that the trial judge had difficulty accepting Petitioners' statements that Mr. Rosenbleeth was the lead counsel in this case.

With regard to Petitioners' contentions that they were required to substitute counsel at the last minute, the facts indicate that a week before trial, Petitioners were aware of the fact that the case would proceed. Petitioners had the Court's permission to utilize Mr. Rosenbleeth on only the important matters, so that he would not have to remain during the entire trial. (R. 116a-117a). Mr. Haft was present through the entire pre-trial stage of the case and was also present during the trial. It is clear that if in fact substitute counsel was necessary, ample time and assistance were available to prepare for and try this case.

Petitioners attempt to find a basis for a violation of due process by arguing that they were denied their opportunity to be represented by counsel of their choice at the time of trial. Initially, it must be pointed out that Petitioners' reliance on case law involving criminal proceedings as support for their position that there was a

violation of due process, is not dispositive of the instant case. The right of a defendant in a criminal proceeding to be represented by counsel of his choice is guaranteed by the Constitution. In such a case, due process demands that a defendant be afforded a fair opportunity to obtain the assistance of counsel of his choice and to prepare and conduct his defense. This constitutional mandate is satisfied so long as the *accused* is afforded a fair or reasonable opportunity to obtain particular counsel, and so long as there is no arbitrary action prohibiting the effective use of such counsel. However, the conclusion is inescapable that "[A]lthough the right to counsel is absolute, there is *no absolute right to a particular counsel*." *United States ex rel Carey v. Rundle*, 409 F.2d 1210, 1215 (3rd Cir., 1969), cert. denied, 397 U.S. 946 (1970). (emphasis supplied). As was stated in *Gandy v. Alabama*, 569 F.2d 1318 (5th Cir., 1978), "at some point, that right [to counsel of choice] must bend before countervailing interests involving effective administration of the courts." *Gandy*, 569 F.2d at 1323, n. 9.

Petitioners attempt to argue that they had a Constitutional right to be represented at trial by Mr. Rosenbleeth. However, it must be noted that in a *criminal* matter, involving life and liberty interests, there is no absolute right to a particular counsel. Therefore, in a civil case where only property interests are at stake, the due process requirements are much less stringent, and an *absolute* right to a particular counsel does not exist. Ordinarily, "all that due process requires in a civil case is proper notice and service of process and a court of competent jurisdiction." *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1027 (1982), rehearing denied 702 F.2d 81, cert. denied 464 U.S. 818 (1983).

Petitioners cannot argue that they were not granted sufficient notice of the trial of this matter, and that they were not given a fair opportunity to present their case. There is no contention by the Petitioners that they were not adequately represented at the trial by competent

counsel. To the contrary, Petitioners' position is that they were entitled to be represented by Mr. Rosenbleeth alone. As is clear from the case law, such an *absolute right* to particular counsel is not constitutionally protected.

Based upon the substantial advance notice as to the dates for commencing the trial, the reasons for the case to proceed on schedule, the number of lawyers involved in the representation of the Petitioners throughout the proceedings, and the vague unexplained reasons given by Petitioners for the continuance, it is clear that the denial by the trial judge of Petitioners' request for continuance did not constitute an abuse of discretion and further, did not constitute any violation of Petitioners' due process.

II. THE TRIAL COURT'S CHARGE WAS CONSISTENT WITH PENNSYLVANIA LAW AND AS SUCH DOES NOT CONSTITUTE A BASIS FOR REVIEW BY THIS COURT.

Pursuant to the well-established principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny, it is clear that Pennsylvania law is applicable to the instant action. Furthermore, it is clear that under Pennsylvania law, strict liability under §402A requires the plaintiff to prove that the product was "in a defective condition" and that the defect *caused* the injury. *Azzarello v. Black Brothers*, 480 Pa. 547, 391 A.2d 1020 (1978); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975); *Webb v. Zern*, 422 Pa. 424, 228 A.2d 853 (1966). As is evident from a review of the trial court's charge, Judge Willson properly instructed the jury on these principles.

Petitioners aver that the *Erie* doctrine was repudiated by the trial court's failure to include the words "substantial factor" in the charge on causation. A review of

the trial court's charge in its entirety, which was affirmed by the Third Circuit, establishes that Petitioners' arguments are without merit.

The trial court's charges on causation began as follows:

So this machine today though was under 402(a), the Restatement of the Law, and that simply says this: the issue I mentioned a half dozen times and I guess I better talk to it one more time, and that's when a manufacturer manufactures a product, and guarantees its safety for the use for which it was intended. If a defect — if it has a defect which causes an injury, liability is certain. (R. 329a).

Instructing the jury on the definition of cause, the trial court stated:

The cause of it, the cause of my hurting my fist is if I bang it against that side of this desk maybe. See, *a cause, a cause*. Now if there is a defect there, that does not cause it, then there's the problem in your case is of course, what caused this thing, what caused this thing? (R. 339a). (emphasis supplied).

Judge Willson continued by stating:

If you find that lack of a cutoff switch or guards over the snapping rolls made this corn picker defective, that it is unsafe for its use, Massey-Ferguson caused the harm. (R. 343a). (emphasis supplied).

As is indicated by the excerpts from the charge, the trial judge properly instructed the jury. In fact, as was stated by the Third Circuit, far from prejudicing the Petitioners, the trial court instructed the jury that *if it found a defect in the corn picker, Massey-Ferguson caused the harm to Leonard Solties*. This charge by Judge Willson was tantamount to a directed verdict against Massey-Ferguson if a defect in the corn picker was found by the jury.

A review of the trial court's charge does not indicate any instruction, or inference to the jury, that there must be a finding of "no other cause of the injuries" as a prerequisite to liability. Contrary to Petitioners' arguments, the trial court's charge was not contrary to Pennsylvania law on causation, but rather, eliminated from the jury's discretion the possibility of alternate or concurrent causes.

Petitioners also aver that the trial court's charge injected contributory negligence into a products liability case which was contrary to Pennsylvania law. However, as was indicated by the Third Circuit, the Petitioner did not properly object to the charge as is required under Rule 51 of the Federal Rules of Civil Procedure. A failure to object to an instruction precludes the Petitioner from now alleging error as a basis for a new trial on appeal.

It is well-established that a trial judge has the discretion to summarize the evidence gathered at trial and the extent of his review depends largely upon the circumstances of the case and is left within the judgment and discretion of the trial judge. *McGowan v. Devonshire Hall Apartments*, 278 Pa. Super. 229, 420 A.2d 514 (1980). Petitioners attempt to rely on an isolated portion of the charge, arguing that it amounted to an instruction on the contributory negligence of Leonard Solties, contrary to Pennsylvania law. It is clear, however, from the text of the charge (R. 340a-342a), that the comments on the testimony related directly to credibility.

Petitioners also make reference to the issue of assumption of the risk. While Massey-Ferguson believed that sufficient evidence had been introduced to permit a charge on assumption of the risk, the trial court refused to grant said charge. As such, Petitioners have no basis to allege that the trial court's charge was contrary to Pennsylvania law on this issue.

In an effort to allege a basis upon which this Court may grant Certiorari, Petitioners aver that they were forced to satisfy some "novel burden of proof." A review

of the trial court's charge in its entirety clearly indicates that the charge was proper under Pennsylvania law and did not present any novel burdens. The Third Circuit, upon reviewing the charge, held that errors were *not* present on either the issue of causation or contributory negligence.

Petitioners have failed to present the mandated special and important reasons required by Supreme Court Rule 17.1 for review on Writ of Certiorari, and as such, the Petition should be denied.

III. THE TRIAL COURT'S EXCLUSION OF PLAINTIFFS' REBUTTAL TESTIMONY WAS PROPER AND DOES NOT PROVIDE A BASIS FOR A CONSTITUTIONAL CHALLENGE OF A VIOLATION OF DUE PROCESS.

The exclusion by the trial court of the Petitioners' offer as rebuttal testimony the deposition of Frances Solties, the Petitioner's brother and the videotape deposition of Dr. John Lubahn, one of Petitioner's treating physicians, does not constitute a violation of the Constitutional right of procedural due process. Under the Federal Rules of Evidence, a trial court has broad discretion in determining the relevancy and admissibility of evidence. "It is only when the trial court excludes relevant evidence without sufficient justification that a defendant's right to compulsory due process is violated." *United States v. Peltier*, 585 F.2d 314, 332 (8th Cir., 1978), cert. denied 440 U.S. 945 (1979).

In the instant case, the excluded evidence was rebuttal testimony, for which the standard of review is well-established. In *Bowman v. General Motors Corp.*, 427 F. Supp. 234 (E.D. Pa. 1977), the Court stated:

There is a unanimous agreement that on rebuttal it is properly within the discretion of the trial judge to limit testimony to that which is precisely

directed to rebutting new matter or new theories presented by the defendant's case in chief. (Citations omitted).

Conversely, the *only* cases in which the District Court's discretion to exclude rebuttal testimony has been found to be abused are those in which defendant's witnesses have presented an alternative theory or new facts or have otherwise created a need for a particularized response. (Citations omitted).

Id. 427 F. Supp. at 240. See also, *Upshur v. Shephard*, 538 F. Supp. 1176 (E.D. Pa. 1982).

Pursuant to Rule 403, Federal Rules of Evidence, the District Court may exclude relevant evidence which is otherwise cumulative, a waste of time, misleading or confusing to the jury which causes undue delay or unfair prejudice. The District Court's control is further enhanced by the discretionary powers under Federal Rule of Evidence 611(a) which states that the Court shall exercise control over the mode and order of interrogating witnesses and presenting evidence. As the "governor of the trial for the purpose of assuring its proper conduct," the District Court exercises broad powers to "determine generally the order in which parties will adduce proof." *Gedders v. United States*, 425 U.S. 80, 86 (1976).

The proffered deposition testimony of Frances Solties was sought to be introduced to contradict the testimony given by Solties' other brother, Anthony. As was stated by the Third Circuit, Frances' testimony would not have gone to the substance of Anthony's testimony, but would only have contradicted it insofar as it related to the time at which Leonard told Anthony about the accident. The Third Circuit also found that the testimony sought to be contradicted related to assumption of the risk, a defense on which the jury was never instructed. Finally, the Third Circuit determined that even if the

proffered deposition testimony was proper for rebuttal, Petitioners' substantive rights were not affected by its exclusion.

Petitioners also aver that the testimony of Dr. Lubahn was erroneously excluded. However, the testimony of Dr. Lubahn was not proper rebuttal. Respondents intended to present as an expert Dr. Peter Fuller. A report filed by Massey-Ferguson, and attached to their Pre-Trial Statement, indicated that Dr. Fuller opined that the injuries sustained by Leonard Solties were the result of his attempts to unplug the corn picker while it was in operation. (See Massey-Ferguson Pre-Trial Statement). However, Dr. Fuller was not permitted to testify. (T.R. 393). Since Massey-Ferguson was prevented from introducing as evidence in their case in chief the theory presented by Dr. Fuller, the proffered testimony of Dr. Lubahn was not proper rebuttal.

As was stated above, the trial judge did not instruct the jury on the assumption of the risk. Therefore, the offered testimony of Dr. Lubahn did not go to the issue of causation. In light of the fact that Massey-Ferguson's expert was not permitted to testify as to how the accident occurred, and the jury was not instructed on assumption of the risk, any basis for Petitioners to introduce Dr. Lubahn's testimony was eliminated.

Finally, the portion of Dr. Lubahn's testimony offered by Petitioners as rebuttal was obtained over objection of Massey-Ferguson's counsel. Dr. Lubahn's opinion that the injuries to Leonard Solties' hand were not consistent with Leonard having reached into the machine as contended by Dr. Fuller was beyond any report filed by Dr. Lubahn or supplied by Petitioners' counsel. As such, the offered testimony of Dr. Lubahn was in contravention of the rules governing pre-trial procedure and experts' opinions. Thus, this particular portion of Dr. Lubahn's testimony was neither admissible in plaintiff's

case in chief nor did it constitute proper rebuttal and as such, was properly excluded and did not violate any procedural due process.

Petitioners' argument that the exclusion of this testimony rises to the level of a due process violation is completely unsupported by case law. The case law cited by Petitioners as controlling involved situations where litigants were not given adequate notice, or were denied such rights as the ability to communicate freely with their counsel. Petitioners have failed to come forth with any case law which supports their contentions that rebuttal testimony, such as was excluded in the instant case, constitutes a violation of procedural due process which would provide a basis for review by this Court.

CONCLUSION

Petitioners have failed to present the mandated special and important reasons required by Supreme Court Rule 17.1 which indicates the basis for review on Writ of Certiorari by this Honorable Court. As such, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,
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